

House Joint Resolution 11
Testimony of Al Smith, Montana Trial Lawyers

Our world today is dominated by corporations. We see it in most of the news we get, filtered through the ever smaller number of corporations that own our newspapers, TV and radio news sources. We see it in corporations performing governmental, military and intelligence functions in Iraq. We see it in an administration filled with corporate foxes appointed to guard the chicken houses that protect our public resources. And, we see it in the laws churned out, at the behest of and to the benefit of corporations, in Congress and in our state legislatures.

Corporations and their messages have become so pervasive that we hardly even question their place in our country anymore. It wasn't always so. Most of us remember our grievances that led to the American Revolution as being against good old King George. What most of us don't remember, or never learned, was that many of our grievances were with King George carrying out the bidding of the few corporations that dominated colonial America, like the East India Company. In 1776 we declared our independence not only from British rule, but also from the corporations of England that dominated and controlled us, and extracted wealth from us.

In the early days of our country, we the people, through our state legislatures, allowed corporations to be chartered to serve solely as a tool to gather investment and disperse financial liability for the public good, such as construction of roads, bridges or canals. Our country's founders retained a healthy fear of the threats posed by corporate power and sparingly granted corporations a limited business role.

These state laws, many of which remain on the books today, imposed strict conditions. A corporate charter was granted for a limited time and for a specific public purpose - build your road, dissolve the corporation and pay the stockholders. Corporations could engage only in activities necessary to fulfill their chartered purpose - no cigarette companies pushing macaroni & cheese, and beer too. Corporations could be terminated if they exceeded their authority or if they caused public harm. Owners and managers were responsible for criminal acts committed by the corporation. Corporations could not make any political contributions, nor spend money to influence legislation. A corporation could not purchase or own stock in other corporations, nor own any property other than that necessary to fulfill its chartered purpose.

Granted limited powers, corporations continually sought more from state legislatures. Mindful of the corporate tyranny they had cast aside in the Revolution, most opposed any further expansion

of corporate power. Thomas Jefferson said, "I hope we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength, and bid defiance to the laws of our country."

For 100 years after the Revolution, citizens and legislators tightly controlled the corporate chartering process. Having thrown off English corporate rule, we made certain that charters were issued one at a time, for a specific purpose and for a limited number of years, and, the laws restricting corporate actions were enforced by the states. Early legislators granted very few corporate charters, and only after debate. Citizens governed corporations by detailing operating conditions not just in charters but also in state constitutions and state laws. In Europe, charters protected directors and stockholders from liability for debts and harms caused by their corporations. American legislators rejected this corporate shield. The penalty for abuse or misuse of the charter was not a plea bargain and a fine, but dissolution of the corporation.

An important vestige from that era is Article XIII, Section 1 of our Montana Constitution. It provides for our power to charter corporations, and a mandate to the Montana legislature to "provide protection and education for the people against harmful and unfair practices by" corporations.

The men running corporations were not content. They continued to battle over charter controls, and then to control labor, resources, community rights, and political sovereignty. Ever more frequently, corporations abused their charters to become conglomerates and trusts. They converted the nation's resources into private fortunes, creating factory systems and company towns. Political power began flowing to absentee owners, rather than community-based businesses.

The most severe blow to citizen control of corporations was the 1886 Supreme Court case of *Santa Clara County v. Southern Pacific Railroad*. A case about local taxation powers became the precedent by which corporations became "persons" under the U.S. Constitution, entitled to all the rights of any other person, even though the Constitution never mentions corporations. The 14th Amendment, enacted to protect rights of freed slaves, has since been used to strike down hundreds of local, state and federal laws enacted to protect people from corporate harm.

Having gained Constitutional equality with we the people, corporations have moved on to demand special treatment. Not content with getting protection for directors and stockholders from liability for debts and harms caused by their corporations, a special immunity rejected when we the people still remembered

our English corporate abusers, corporations now seek protections for the corporations themselves for the harms they cause. Whether it's asbestos manufacturers, HMO's, drug companies or makers of dangerous products, they all ply the halls of Congress, by the thousands, seeking, no, demanding, and getting, protection from "activist judges," trial lawyers and we the people.

We have gone from protecting people from harmful corporations to protecting corporations from accountability to the people they harm. If only we too could protect ourselves and property, our freedom, and our country, simply by dethroning a guy named George who does the bidding of domineering and abusive corporations.

This is Al Smith for the Montana Trial Lawyers,
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Last month I talked a little about the history of corporations in our country. Based on the feedback I received, I struck a chord with people.

A brief recap - our country was founded with a healthy concern for the power of corporations. Our revolution was not just against King George, but also against the handful of corporations that abused colonists with George's help. The revelers at the Boston Tea Party didn't go after the King's ships, rather they went after the ships of the East India Company. As a result, in the early days of our country, we the people, through state legislatures, allowed corporations to be chartered to serve solely as a tool to gather investment and disperse financial liability for the public good. Our country's founders retained a healthy fear of the threats posed by corporate power and sparingly granted corporations a limited business role.

The men running corporations were not content. They continued to battle over corporate charter controls. In the latter half of the 19th century, ever more frequently, corporations abused their charters to become conglomerates and trusts, converting the nation's resources into private fortunes, and consolidated political power by ignoring or gutting prohibitions on lobbying.

The most severe blow to citizen control of corporations was the 1886 Supreme Court case of *Santa Clara County v. Southern Pacific Railroad*. Had our founding fathers wished to make corporations persons under the Constitution, they could have, but they did not because they understood the potential abuses of corporations. In *Santa Clara*, the 14th Amendment, enacted to protect rights of freed slaves, was used to make the legal creations of corporations into "persons" with all the rights afforded real

flesh and blood citizens. Using that new found foothold, corporations have sought more and more control of our laws, while accepting less and less accountability and responsibility for the harms they cause.

Over the recent past we have been subjected to several stories of corporate abuses - Enron, Worldcom, Firestone, Montana Power and W.R. Grace to name a few. The spin we have heard again and again is that all corporate wrongdoing is rooted primarily in unethical behavior among a few "bad apple" executives. The "bad apples" explanation ignores the real source of corporate wrongdoing: the very structure and nature of corporations and the laws that govern them.

Jerry Mander, in his 1991 book, *In the Absence of the Sacred*, explores what he calls the "Eleven Inherent Rules of Corporate Behavior." They illustrate the severe limitations of what we quaintly call "corporate responsibility." These Rules expose the fallacy of the "bad apples" theory and illustrate the impotency of mere regulation or pleas for corporate self-responsibility. Let me give you a few, brief real world examples of how a couple of these rules of corporate behavior manifest themselves in our country today.

Primary among the rules is the Profit Imperative - because maximizing return to shareholders is legally required of corporate officers, profit must be the ultimate measure of all corporate decisions. Profit is more important than consumer safety, worker safety, public health, environmental preservation, or community well-being.

The primacy of profit may have economically destructive impacts, such as Enron's manipulation of electricity markets to maximize profits on the backs of consumers. The most notorious case involving the cost-benefit-profit analysis is the Ford Pinto. In the early 1970s, Ford Motor Company analyzed the costs and benefits of relocating the Pinto gas tank to greatly reduce the likelihood of fires and explosions in rear-end collisions. The predicted cost: \$11 per vehicle. The benefits: 180 lives saved and 180 serious burn injuries prevented each year. Ford decided that the benefits of saving 180 lives a year did not justify the costs. Ford calculated that it would have to pay \$200,000 per death and \$67,000 per injury - a lot to you and me, but cheaper, and more profitable, to Ford than just fixing the problem.

The public eventually learned that the Pinto had a tendency to explode in rear-end collisions, and victims and their families sued the company. A jury, indignant over Ford's callousness, awarded \$125 million in punitive damages - 600 times Ford's predicted cost to pay for their victim's fiery deaths. It wasn't

until after juries awarded punitive damages - an unpredictable cost that didn't fit into their cost benefit analysis - that Ford fixed the problem. The corporate solution, governed by the profit imperative, is not to eliminate unsafe products. No, the profit imperative compels corporations to seek elimination of, or statutory limits on, punitive damages in our legislatures and our courts - thus making the calculation of costs of human lives and thus corporate profits more predictable. And that is the course they have chosen.

Another inherent rule of corporations is that of structural amorality. Corporations are artificial creations, shielded from obligations of personal morality and responsibility by their very design. The result are decisions that may be antithetical to community interests, workers' welfare, consumer safety, or public health, decisions made without risk of personal liability to the shareholders of the corporation. Especially when coupled with the profit imperative, structural amorality allows a W.R. Grace to devastate its workers and their families, and a whole community, like Libby, and then avoid responsibility. Unshackled by the protections our founding fathers insisted upon, corporations like Grace have perversely used our government to protect themselves from accountability to the real people of this country that they harm.

It's easy to forget lessons not learned through personal experience. Our founding fathers understood that the true threat from corporations came not from a few "bad apples" but from the nature of corporations themselves. Have we learned that yet?

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